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Supreme Court, U.S.
FILED

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 224

SUSIE BARNHILL; HOWARD G. PINDER, SR.; HOWARD G. PINDER, JR.; and FREDI CLARKE,

Petitioners,

-vs-

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

A. THE OPINIONS BELOW.

The judgments of the United States District Court for the Southern District of Florida imposing special conditions of probation upon the petitioners herein have not been reported, and are printed in "Appendix A" hereto. The opinion of the Court of Appeals for the Fifth Circuit dismissing the appeal taken to that Court is re-

ported in _____F. 2d _____ and is printed in "Appendix B" hereto.

B. GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

1. The judgment of the Court of Appeals sought to be reversed was dated and entered the 8th day of June, 1960.

2. No rehearing was requested by the petitioners in the Court of Appeals. No extension of time to petition for certiorari has been requested or granted.

3. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U. S. C. 1254 (1).

C. QUESTION PRESENTED.

Are the special terms of probation imposed upon the petitioners an abuse of the lower court's discretion, pursuant to the terms of the Federal Probation Act?

D. STATUTES AND RULES INVOLVED.

The statutes and rules involved are:

1. Title 18 U. S. C., Section 371
2. Title 18 U. S. C., Section 3651
3. Title 26 U. S. C., Section 4401
4. Title 26 U. S. C., Section 4411
5. Title 26 U. S. C., Section 4412
6. Title 26 U. S. C., Section 4421

7. Title 26 U. S. C., Section 4901(a)
8. Title 26 U. S. C., Section 7201
9. Title 26 U. S. C., Section 7203

The applicable portions of all the foregoing are set forth in "Appendix C" hereto.

E. STATEMENT OF THE CASE.

On the 14th day of November, 1958, the United States filed an information, No. 10,860-M-Criminal, in the United States District Court, Southern District of Florida, Miami Division, charging the petitioners, HOWARD G. PINDER, SR.; HOWARD G. PINDER, JR.; SUSIE BARNHILL; FREDI CLARKE, and others, with a violation of Title 18, UNITED STATES CODE, Section 371 (conspiracy), and additionally charging that the conspiracy was formulated for the purpose of violating Title 26, UNITED STATES CODE, Sections 4412, 4411, 4401, 4421 and 7203.

On the same date, the 14th day of November, 1958, the United States Attorney in an information, No. 10,861-M-Criminal, charged the petitioners, HOWARD G. PINDER, SR., and HOWARD G. PINDER, JR., with violations of the Internal Revenue Code, Title 26, UNITED STATES CODE, Sections 4411, 4412, 4421, 4901(a) and 7203.

On the 4th day of June, 1959, the Grand Jury sitting at Miami, Florida, in the Southern District of Florida, Miami Division, returned an indictment, No. 11,184-M-Criminal, charging the defendants, HOWARD G. PINDER, SR., and HOWARD G. PINDER, JR., with violation

of Title 18, UNITED STATES CODE, Section 371 (conspiracy), the object of the conspiracy being to wilfully evade and defeat wagering excise taxes imposed by Title 26, UNITED STATES CODE, Sections 4401, 4421 and 7201.

On the 15th day of December, 1959, the petitioners filed their Motion to Dismiss in the consolidated cases (R. 11)*, said motion being denied by the Court. On the 15th day of December, 1959, the petitioners, HOWARD G. PINDER, SR.; HOWARD G. PINDER, JR.; SUSIE BARNHILL and FREDI CLARKE moved to withdraw their plea of Not Guilty to the several informations and indictment.

Thereupon, SUSIE BARNHILL entered a plea of Guilty to information No. 10,860-M-Criminal, and FREDI CLARKE entered a plea of Guilty to information No. 10,860-M-Criminal, whereupon the Government nol-prossed the charges against the remaining defendants in that information (R. 36).

The petitioner, HOWARD G. PINDER, JR., on withdrawing his plea of Not Guilty to the information No. 10,861-M-Criminal, entered a plea of Guilty to the Second Count of that information, the Government moving to nol-pros the First Count of the information, and further nol-prossing both counts of the information as to HOWARD G. PINDER, SR. (R. 43).

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*Parenthetical references, unless otherwise indicated, are to pages of the record in the court below in the case of SUSIE BARNHILL; HOWARD G. PINDER, SR.; HOWARD G. PINDER, JR.; and FREDI CLARKE, Appellants, vs UNITED STATES OF AMERICA, Appellee, No. 18,183.

The petitioner, HOWARD G. PINDER, SR., on withdrawing his plea of Not Guilty to the indictment, No. 11,184-M-Criminal, entered a plea of Guilty to the charges contained in the single count of that indictment, and the Government moved to dismiss the indictment as to HOWARD G. PINDER, JR.

On the 28th day of December, 1959, the petitioners, HOWARD G. PINDER, SR.; HOWARD G. PINDER, JR.; SUSIE BARNHILL and FREDI CLARKE appeared before the Court for the Southern District of Florida, Miami Division, for sentencing. At the time of the sentencing of the lower court the attorney for the petitioners stated that the principal, HOWARD G. PINDER, SR., had since the 6th day of November, 1958, paid the special tax (R. 28), and had complied with Title 26, UNITED STATES CODE, Section 4401, in the payment since that date of the 10% excise levied by that section of the Internal Revenue Code.

The court below suspended the execution of a five (5) year sentence upon HOWARD G. PINDER, SR., and placed the petitioner on probation for five (5) years, and ordered payment to the UNITED STATES OF AMERICA of a fine in the sum of $10,000.00.

A special condition of probation of the petitioner, HOWARD G. PINDER, SR., imposed by the Court was that during his probation he should not associate himself directly or indirectly with any gambling enterprise or game of chance, or system of gambling. The petitioner was further instructed, as a special condition of probation, that he should not associate in any way or manner with persons engaged in any such activity (R. 62).

Similar conditions of probation were imposed upon the petitioners, FREDI CLARKE (R. 68), SUSIE BARNHILL (R. 72) and HOWARD G. PINDER, JR. (R. 65).

F. REASON FOR GRANTING THE WRIT

It is respectfully submitted that a writ of certiorari should be granted herein because the decision of the Court of Appeals for the Fifth Circuit herein has decided a federal question in a way probably in conflict with applicable decisions of this Court.

THE SPECIAL TERMS OF PROBATION IMPOSED UPON THE PETITIONERS ARE IN ABUSE OF THE LOWER COURT'S DISCRETION IN ITS FAILURE TO PROPERLY APPLY THE LAW TO THE FACTS.

The Federal Probation Act, Title 18, UNITED STATES CODE, Section 3651, in part states:

> "* * * any court having jurisdiction to try offenses against the United States, * * * when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best."

The conditions of probation are left to the court as a matter of judicial discretion.

In determining whether or not the special conditions

imposed in the instant case constitute an abuse of judicial discretion, it is necessary to first determine in law a definition of judicial discretion. In the case of **Cunningham, et al. v. Douglas, et al.** 72 F. 2d 536, at page 538, the First Circuit Court of Appeals, in referring to the definition of judicial discretion, stated:

> "'When invoked as a guide to judicial action, it (judicial discretion) means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully but with regard to what is right and equitable under the circumstances *and the law*, and directed by the reason and conscience of the judge to a just result.' **Langnes v. Green**, 282 U. S. 531, 541, 51 S. Ct. 243, 247, 75 L. Ed. 520" (Italics added.)

Judicial discretion is further defined as not the indulgence of a judicial whim but the exercise of judicial judgment based on facts and *guided by* law. See BLACK'S LAW DICTIONARY, Third Edition, page 588, "judicial discretion".

The facts of the instant appeal are that the petitioners are admitted gamblers, but it is well settled that gambling as such does not violate any federal statute. As the Fifth Circuit Court stated in the case of **Clay v. United States**, 239 F. 2d 196, at page 198:

> "The significant thing is that the taking, placing or handling of wagers or conducting a lottery is not a Federal crime unless registration and payment of taxes is not made."

The particular law of which the petitioners are accused of violating or conspiring to violate has been upheld by this Court as a constitutional exercise of the taxing powers granted to the Congress of the United States under the Constitution of the United States. **United States v. Kahriger, 73 S. Ct. 510, 345 U. S. 22.**

In the Kahriger case, supra, this Court, in refuting the argument that the provisions of the so-called Gamblers' Tax statutes are unconstitutional as an encroachment upon the powers reserved to the states, referred specifically, in footnote 4, at page 513, of that opinion, to the revenues derived from the imposition of the special tax on gambling.

Indeed, in the **Kahriger** case, supra, Mr. Justice Jackson, concurring in the decision of the majority of this Court, at page 517, stated:

> "It will be a sad day for the revenues if the good will of the people toward their taxing system is frittered away in efforts to accomplish by taxation moral reforms that cannot be accomplished by direct legislation. But the evil that can come from this statute will probably soon make itself manifest to Congress."

The effect of the Kahriger decision in the present state of the law, therefore, is to uphold the so-called Gamblers' Occupational Tax statutes as being a bona fide revenue measure and not designed as a police measure.

In the case of **Lewis v. United States, 348 U. S. 419, 75 S. Ct. 415**, again this Court, in referring to the Gam-

blers' Occupational Tax Act, in footnote 1 on page 418, referred to the government's brief in the Kahriger decision and pointed out that in the Kahriger decision the government argued:

> "Wagering is doubtless unlawful in many states (perhaps in all but Nevada) but it is not forbidden by any federal law."

In the case of the **United States** v. **Calamaro**, 77 S. Ct. 1138, 354 U. S. 351, again this Court stated, at page 1143:

> "We can give no weight to the Government's suggestion that holding the pickup man to be not subject to this tax will defeat the policy of the statute because its enactment was 'in part motivated by a congressional desire to suppress wagering.' The statute was passed, and its constitutionality was upheld, as a revenue measure, **United States** v. **Kahriger**, 345 U. S. 22, 73 S. Ct. 510, 97 L. Ed. 754, and, apart from all else, in construing it we would not be justified in resorting to collateral motives or effects which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt. See Id., 345 U. S. at page 31, 73 S. Ct. at page 514."

In the exercise of the District Court's discretion then in imposing the special conditions of probation which prohibits the individuals from engaging in wagering, the Court failed to apply properly the law as pronounced by this Court in respect of the Gamblers' Occupational

Tax statutes as being a revenue mesure. The failure to so apply the law violates part of this Court's pronouncement as to the definition of judicial discretion.

It is noted that the government, in respect of its interpretation of the Gamblers' Occupational Tax statutes, urges that this Court examine the *policy* of the statute. **United States** v. **Calamaro** supra.

It is not the proper function for the federal judiciary to determine the *policy* of a statute. Indeed, in the **License Tax Cases, 72** U. S. **497**, Chief Justice Chase of this Court, at page 500, stated:

> "This court can know nothing of public policy except from the Constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be address to the legislature. Questions of policy determined there are concluded here."

And again at page 501:

> "But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within state limits, they give none and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties

for the nonpayment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under the national law; if he pays it."

To allow the District Court under the circumstances of the instant case to proscribe gambling is to disregard the decisions of this Court in respect of the constitutionality of the Gamblers' Occupational Tax Acts as a revenue measure and to bolster the government's contention that the policy of the acts in question is to eradicate gambling in the several states. Such an interpretation, be it as a condition of probation, or otherwise, violates the principles of the dual sovereignty as between state and federal government, and as Mr. Justice Field stated in the case of **United States** v. **Tarble**, 80 U. S. 597, at page 600:

"Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion shall be necessary on the part of the national government to preserve its rightful supremacy in cases of conflict of authority. In their laws and mode of enforcement neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all, shall be vested in their officers, are matters sub-

> ject to their own control, and in the regulation of which neither can interfere with the other."

The petitioners admitted grambling activities and further purchased the so-called wagering tax stamp, and from the time of their apprehension until the time of the imposition of sentence paid excise taxes on their gambling activities to the United States of America. Title 26, U. S. C., Sections 4401, 4411.

Despite decisions of this Court designating the Gamblers' Occupational Tax statutes as a revenue measure, and despite the District Court's own analysis of the government's position (R. 60):

> "If the Court takes the view of the law, the Government does not want you to get out of the business,"

the District Court then proceeded to adopt the position of the government which was rejected by this Court in the Calamaro case supra by reading into the terms of probation for the petitioners special conditions of probation which in effect put them effectively out of the gambling business (R. 62).

It is respectfully submitted that the District Court in imposing special conditions of probation (1) failed to apply the proper principles of law in respect of the passage of the act under which the petitioners were convicted, and (2) failed to recognize the Gamblers' Occupational Tax Acts as a measure designed by the Congress for the increasing of the nation's revenues, as has been repeatedly so decided by this Court.

CONCLUSION

UPON THE FOREGOING GROUNDS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,
WORTON & CLINE

By _____
O. B. CLINE, JR.
Attorneys for Petitioners

APPENDIX A

JUDGEMENTS OF THE DISTRICT COURT

JUDGMENT

Filed Dec. 28, 1959.

In the District Court of the United States for the Southern District of Florida, Miami Division.

United States of America

vs.

Case No. 10,860-M-Cr.

Fredi Clarke.

On this 28th day of December, A. D. 1959, came the attorney for the Government and the Defendant appeared in person and with his counsel, J. Edward Worton, Esq.

It Is Adjudged that the Defendant has been convicted upon his plea of Guilty of conspiring to violate the Internal Revenue Laws thereby and contrary to Title 18 USC, Section 371 as charged in the Information, and the Court having asked the Defendant whether he has anything to say why Judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the Defendant is Guilty as charged and convicted.

It Is Adjudged that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year or until otherwise discharged by due course of law, it being further

Ordered and Adjudged that execution of sentence of confinement be and the same is hereby suspended and the Defendant placed on probation with the Miami Division for a period of Five (5) Years pursuant to the Court's Order entered December 1, 1939, imposing Standing Conditions of Probition, and upon the following Special Conditions:

1. During the period of probation, the Defendant shall pay a fine unto the United States of America in the sum of Fifteen Hundred Dollars, payable within such time and in such installments as may hereafter be designated by the Probation Officer.

2. That he shall obey all laws applicable to his good behavior and fully comply with all rules and regulations as may hereafter be prescribed by the Probation Officer for the guidance of his personal conduct.

3. That he shall refrain from engaging, either directly or indirectly, in any game of chance, including lottery, or in any other method of gambling, professional or otherwise.

4. That he shall not associate with any persons who are engaged in or involved with games of chance or gambling.

Done and Ordered this 28th day of December, A. D. 1959, at Miami, Florida.

WM. C. MATHES,
(Wm. C. Mathes),
United States District Judge

App. 3

JUDGMENT

Filed Dec. 28, 1959

In the District Court of the United States for the Southern District of Florida, Miami Division.

United States of America,

vs.

Case No. 10,860-M-Cr.

Susie Barnhill.

On the 28th day of December, A. D. 1959, came the attorney for the Government and the Defendant appeared in person and with her counsel, J. Edward Worton, Esq.

It Is Adjudged that the Defendant has been convicted upon her plea of Guilty of conspiring to violate the Internal Revenue Laws thereby and contrary to Title 18, USC, Section 371 as charged in the Information, and the Court having asked the Defendant whether she has anything to say why Judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the Defendant is Guilty as charged and convicted.

It Is Adjudged that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year or until otherwise discharged by due course of law, it being further

Ordered and Adjudged that execution of sentence of confinement be and the same is hereby suspended and the Defendant placed on probation with the Miami Division for a period of Five (5) Years pursuant to the Court's Order entered December 1, 1939, imposing Standing Conditions of Probation, and upon the following Special Conditions:

1. During the period of probation, the Defendant shall pay a fine unto the United States of America in the sum of Fifteen Hundred Dollars, payable within such time and in such installments as may hereafter be designated by the Probation Officer.

2. That she shall obey all laws applicable to her good behavior and fully comply with all rules and regulations as may hereafter be prescribed by the Probation Officer for the guidance of her personal conduct.

3. That she shall refrain from engaging, either directly or indirectly, in any game of chance, in ding lottery, or in any other method of gambling, professional or otherwise.

4. That she shall not associate with any persons who are engaged in or involved with games of chance or gambling.

Done and Ordered this 28th day of December, A. D. 1959, at Miami, Florida.

WM. C. MATHES,
(Wm. C. Mathes),
United States District Judge

App. 5

JUDGMENT

Filed Dec. 28, 1959

In the District Court of the United States for the Southern District of Florida, Miami Division.

United States of America,

vs.

Case No. 10,861-M-Cr.

Howard G. Pinder, Jr.

On this 28th day of December, A. D. 1959, came the attorney for the Government and the Defendant appeared in person and with his counsel, J. Edward Worton, Esq.

It Is Adjudged that the Defendant has been convicted upon his plea of Guilty to violating the Internal Revenue Laws, Title 26, USC, Sections 4411, 4412, 4421, 4901(a) and 7203 as charged in Count 2 of the Information, and the Court having asked the Defendant whether he has anything to say why Judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the Defendant is Guilty as charged and convicted.

It Is Adjudged that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year or until otherwise discharged by due course of law, it being further

Ordered and Adjudged that execution of sentence of confinement be and the same is hereby suspended and the Defendant placed on probation with the Miami Division for a period of Five (5) Years pursuant to the Court's Order entered December 1, 1939, imposing Standing Conditions of Probation, and upon the following Special Conditions:

1. During the period of probation, the Defendant shall pay a fine unto the United States of America in the sum of Five Thousand Dollars, payable within such time and in such installments as may hereafter be designated by the Probation Officer.

2. That he shall obey all laws applicable to his good behavior and fully comply with all rules and regulations as may hereafter be prescribed by the Probation Officer for the guidance of his personal conduct.

3. That he shall refrain from engaging, either directly or indirectly, in any game of chance, including lottery, or in any other method of gambling, professional or otherwise.

4. That he shall not associate with any persons who are engaged in or involved with games of chance or gambling.

Done and Ordered this 28th day of December, A. D. 1959, at Miami, Florida.

WM. C. MATHES,
(Wm. C. Mathes),
United States District Judge

JUDGMENT

Filed Dec. 28, 1959

In the District Court of the United States for the Southern District of Florida, Miami Division.

United States of America,

vs.

Case No. 11,184-M-Cr.

Howard G. Pinder, Sr.

On this 28th day of December, A. D. 1959, came the attorney for the Government and the Defendant appeared in Person and with his counsel, J. Edward Worton, Esq.

It Is Adjudged that the Defendant has been convicted upon his plea of Guilty of conspiring to evade payment of excise taxes and commit an offense against the United States in violation of Title 18 USC, Section 371, as charged in the Indictment, and the Court having asked the Defendant whether he has anything to say why Judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the Defendant is Guilty as charged and convicted.

It Is Adjudged that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years or until otherwise discharged by due course of law, it being further

Ordered and Adjudged that execution of sentence of confinement be and the same is hereby suspended and the Defendant placed on probation with the Miami Division for a period of Five (5) Years pursuant to the Court's Order entered December 1, 1939, imposing Standing Conditions of Probation, and upon the following Special Conditions:

1. During the period of probation, the Defendant shall pay a fine unto the United States of America in the sum of Ten Thousand Dollars, payable within such time and in such installments as may hereafter be designated by the Probation Officer.

2. That he shall obey all laws applicable to his good behavior and fully comply with all rules and regulations as may hereafter be prescribed by the Probation Officer for the guidance of his personal conduct.

3. That he shall refrain from engaging, either directly or indirectly, in any game of chance, including lottery, or in any other method of gambling, professional or otherwise.

4. That he shall not associate with any persons who are engaged in or involved with games of chance or gambling.

Done and Ordered this 28th day of December, A. D. 1939, at Miami, Florida.

WM. C. MATHES,
(Wm. C. Mathes),
United States District Judge

APPENDIX B

OPINION OF UNITED STATES COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 18183

SUSIE BARNHILL, HOWARD PINDER, SR., HOWARD PINDER, JR. and FREDI CLARKE,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court for the Southern District of Florida

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(June 8, 1960.)

Before HUTCHESON, JONES and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: This singular appeal is a by-product of the legal paradox of imposing federal

excise taxes on business activities regarded as criminal in most states.

Four professional gamblers pleaded guilty to evading federal gambling taxes.[1] The district judge offered the defendants the choice between a jail sentence and probation carrying a condition that they give up gambling.[2] They chose probation. Now, however, they are unhappy with what to them in retrospect seems to have been Hobson's choice. They appeal, attacking as an abuse of judicial discretion the probationary condition forbidding gambling.

In a colloquy with one of the defendants the district judge stated that as he viewed it, "the government does not want you to get out of the business (of gambling)." Nevertheless, the defendants say, the court proceeded to put them out of business. Moreover, the argument runs, gambling as such does not violate any *federal* statute and the gambler's occupational tax statute is a measure for the collection of revenue; it is not a police measure. And it is not an instrument for moral reform.

One must say that the appellants, as gamblers apparently still anxious to pursue their chosen profession, are in a predicament. But they got in it of their own doing, elected to stay in it of their own free will, and

[1] 26 USCA, Sections 4401, 4411, 4412, 4421, 4901(a), 7203.

[2] In addition to imposing standing conditions of probation, the judgment imposed the following special conditions:

"3. That he shall refrain from engaging, either directly or indirectly, in any game of chance, including lottery, or in any other method of gambling, professional or otherwise.

"4. That he shall not associate with any persons who are engaged in or involved with games of chance or gambling."

the misgivings they now have should have occurred to them before agreeing to probation on the trial judge's terms. They complain of the court doing exactly what they agreed that the court should do as an alternative to their going to jail. In short they cling to probation while seeking to welch on its price.

It is a reasonable alternative. A broad latitude is given to a district court in prescribing conditions of probation in order to help probationers make the necessary adjustment with society. There is nothing unusual in conditioning probation on the defendant obeying the law, state law and federal law. Florida statutes make it a violation for a person to have gambling paraphernalia in his possession. Professional gambling got these defendants into trouble. It seemes a fair exercise of judicial discretion therefore for the district court to proscribe gambling. In **Stone v. United States**, 9 Cir., 1946, 153 F. 2d 333, dining car employees were convicted of unlawfully taking money from dining cars on trains moving in interstate commerce. The district judge placed the defendants on probation subject to the condition that they not return to employment as stewards on any railroad engaged in interstate commerce. The Circuit Court approved the order although the effect of the order was to deprive the probationers of their usual employment.

We find no abuse of discretion in the district court's

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[3]The Federal Probation Act, 18 U.S.C., Section 3651 in part, states:

"* * * any court having jurisdiction to try offenses against the United States, * * * when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best."

special conditions of probation. On the contrary, the district court tempered justice with a large measure of mercy to defendants admittedly guilty and subject to imprisonment for five years.

The appeal is DISMISSED.

APPENDIX C

STATUTES AND RULES INVOLVED

(Applicable Parts Thereof)

Title 18 U. S. C., Section 371

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *

Title 18 U. S. C., Section 3651

* * * any court having jurisdiction to try offenses against the United States, * * * when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Title 26 U. S. C., Section 4401

§4401. Imposition of tax

(a) Wagers. — There shall be imposed on wagers,

as defined in section 4421, an excise tax equal to 10 percent of the amount thereof. * * * (c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

Title 26 U. S. C., Section 4411

§4411. Imposition of tax

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. * * *

Title 26 U. S. C., Section 4412

§4412. Registration

(a) Requirement.—Each persons required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district— * * *

Title 26 U. S. C., Section 4421

* * * (1) Wager.—The term "wager" means—* * *

"(C) any wager placed in a lottery conducted for profit. * * *

Title 26 U. S. C., Section 4901 (a)

§4901. Payment of tax

(a) Condition precedent to carrying on certain business.—No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461 (2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

Title 26 U. S. C., Section 7201.

§7201. Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. * * *

Title 26 U. S. C., Section 7203.

* * * Any person required under this title to pay any estimated tax or tax, * * * who wilfully fails to pay such estimated tax or tax, * * * shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. * * *

PROOF OF SERVICE

I, O. B. CLINE, JR., one of the attorneys for SUSIE BARNHILL; HOWARD G. PINDER, SR.; HOWARD G. PINDER, JR.; and FREDI CLARKE, the petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 7th day of July, 1960, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon the several parties thereto as follows:

1. On the UNITED STATES by personally delivering and leaving a copy thereof at the office of E. Coleman Madsen, United States Attorney for the Southern District of Florida, at Room 234, Federal Building, Miami, Florida; and

2. By mailing a copy in a duly addressed envelope with airmail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

O. B. CLINE, JR. of
WORTON & CLINE
548 Pan American Bank Bldg.
Miami 32, Florida
Attorneys for Petitioners

ILE COPY

Supreme Court, U.S.
FILED
AUG 1 1960
JAMES R. BROWNING, Clerk

No. 221

In the Supreme Court of the United States

OCTOBER TERM, 1960

SUSIE BARNHILL, HOWARD G. PINDER, SR., HOWARD G. PINDER, JR. and FREDI CLARKE, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM RICHARD WILKEY,
Assistant Attorney General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B 9, R. 81-84) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1960 (R. 85). The petition for a writ of certiorari was filed on July 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court abused its discretion in placing petitioners, who had pleaded guilty to evasion of federal gambling taxes, on probation on the condition that they not engage in further gambling activities.

STATUTE INVOLVED

The pertinent portion of the Federal Probation Act (18 U.S.C. 3651) provides as follows:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

STATEMENT

Petitioners were charged in the United States District Court for the Southern District of Florida with evasion of federal gambling taxes (R. 1-11). On December 15, 1959, they withdrew prior pleas of not guilty and entered pleas of guilty in open court, with counsel present. The court ascertained that the guilty pleas were intelligently and competently made (R. 29-48).

After the probation reports were filed with the court, the trial judge suspended the imposition of sentence and placed petitioners on probation on the condition, among others, that they leave the gambling field and not associate with people who are professional gamblers or are engaged in gambling or running lotteries. The court gave each petitioner the choice of a prison sentence or probation under these conditions. They accepted probation (R. 60-73).

On appeal, petitioners attacked, as an abuse of discretion, the condition forbidding gambling. The court of appeals dismissed the appeal, holding that the condi-

tion was a reasonable one and within the discretion of the trial court. (R. 82-84).

ARGUMENT

Petitioners contend that the condition prohibiting them from further gambling activities while on probation is impermissible because gambling is not a violation of federal law (albeit it concededly violates Florida law). The short answer is that the Federal Probation Act (*supra*) is "designed to provide a period of grace in order to aid the rehabilitation of a penitent offender" and that accomplishment of "the purpose of the statute [requires] an exceptional degree of flexibility in administration." *Burns v. United States*, 287 U. S. 216, 220-221. Certainly it does not exceed the limits to condition the grant of grace upon the defendant's undertaking to become a law-abiding citizen—that is, to comply with the law generally, whether it be federal law or state law. Indeed, persons placed on probation are commonly required to avoid habits and actions, *e.g.*, association with persons of ill repute, which are not unlawful at all.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

August 1960

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